KRISHNAN MARIMUTHU & ANOR.

v.

PUBLIC PROSECUTOR

FEDERAL COURT, KUALA LUMPUR
LEE HUN HOE CJ (BORNEO)
SALLEH ABAS
ABDUL HAMID OMAR FJ
[CRIMINAL APPEAL NO. 19 OF 1979]
16 FEBRUARY 1981

CRIMINAL PROCEDURE: *Cautioned statement of accused used to impeach his credit - Trial within a trial held to determine voluntariness of cautioned statement - Trial Judge not making specific finding that cautioned statement was voluntarily made - Whether omission to make specific finding constitutes a miscarriage of justice.*

CRIMINAL PROCEDURE: *Charge under s. 3A of Firearms (Increased Penalties) Act 1971 - Accused charged as an accomplice - Omission to state reasonable presumption of knowledge in charge - Effect - Whether charge defective.*

The first and second appellants were convicted of an offence under s. 3 and 3A of the Firearms (Increased Penalties) Act 1971 respectively. The first appellants appeal was dismissed as the appeal was based purely on facts and the appellate Court could see no reason to disagree with the findings reached by the trial Judge on the facts.

As for the second appellant, he argued that the charge against him was defective in that it did not state that he "may be reasonably presumed to have known" that the first appellant had a pistol. The second appellant further argued that the trial Judge in using his cautioned statement to impeach his credit had failed to decide on the voluntariness of the cautioned statement.

Held:

[1] The omission in the charge to make any reference to the second appellant's knowledge that the first appellant had a pistol did not render the charge defective. All that had to be stated in order to enable the second appellant to answer the charge was stated and it was not shown that he was in any way prejudiced or misled by the omission. Knowledge is a matter of inference and unless it is clear that the law requires that knowledge be stated in the charge, its omission does not render the charge defective.

[2] Although it was true that the learned Judge did not make a specific finding that the cautioned statement of the second appellant used by the prosecution to impeach his credit was voluntarily made, it was clear that in the inquiry held for the purpose the prosecution had adduced sufficient evidence to enable the learned Judge to make such a finding and this evidence was in no way contradicted by the second appellant. In the circumstances the omission to state that the cautioned statement was voluntarily made did not constitute a miscarriage of justice.

[Appeals dismissed.]

Case referred to:
Muthusamy v. PP [1948] MLJ 57 ***(foll)***

Legislation referred to:
Criminal Procedure Code, ss. 112, 113, 152(iii), 402A
Criminal Procedure Code 1865 [UK], s. 5
Dangerous Drug Ordinance, s. 37A(i)(b)
Evidence Act 1950, ss. 145(1), 155(c)
Firearms (Increased Penalties) Act 1971, ss. 3, 3A

For the 1st appellant - Subra Naicker; M/s. Subra Naicker & Co.
For the 2nd appellant - Karpal Singh (Menon with him); M/s. Karpal Singh & Co.
For the respondent - Shaikh Daud bin Haji Mohamed Ismail; DPP

JUDGMENT

Salleh Abas Omar FJ:

We dismissed the appeal and here are our reasons for the dismissal.

In this case the deceased (one Goh Foo Yang) who was the kepala on Tiong Hin Estate was shot dead on 7 August 1975 at 11.00 a.m. in the estate office. At that time, he was paying wages to the labourers, when suddenly two persons - one Indian armed with a pistol and one Chinese holding a parang and a plastic bag - burst into the office. The Chinese pointed the parang to the deceased whilst the Indian with pistol in his hand was guarding the door. When the deceased stood up and said to them in Malay "Ada apa, ada apa?", the Indian fired a shot at the deceased and as a result of the shot the deceased collapsed and later died of the gun shot wounds. After the shooting both the robbers helped themselves to the money which was then on the table whilst the labourers present in the office to collect their wages bolted out of the office. On hearing the shot, some employees of the estate who were working in the latex store nearby ran to the office to find out what had happened and when they saw the robbers, they too ran away. The robbers finally escaped in a green car.

The case of the prosecution depended on the identification of both the appellants as the two robbers who committed this offence. The first appellant was identified by PW16, whilst the second appellant by PW13. PW16 was a clerk of the estate. At the particular time he was in the latex store nearby. According to him, on hearing the shot he ran towards the office and saw the first appellant coming down from the office. The first appellant was then holding a pistol. This witness was chased by the first appellant but he had a good look at him. PW16 picked up the first appellant in a police identification parade. His evidence was accepted by the learned Judge, and we see no reason to disagree with him. The identification of the first appellant was corroborated by the sight of a car, which was used by this appellant at the approximate time of the robbery on the day in question in the vicinity of the scene. A witness Tumiran bin Mardi (PW10) was Assistant Manager of Government land project at Tebrau adjacent to Tiong Hill Estate. At the approximate time of the robbery on the day in question this witness saw a green Ford Escort car bearing registration number NG 4670 making a U-turn in front of his office. He noted the number of the car. There were four persons in it - 2 Indians in the front seats and two Chinese in the rear seats. This particular car was proved to have in fact belonged to a person who is now dead and on the particular day was lent to the first appellant and was returned by him on the same day at about 9.00 p.m. The learned Judge accepted the evidence of Tumiran bin Mardi and we see no reason to disagree with his decision to do so.

The first appellant was charged with an offence under s. 3 of the Firearms (Increased Penalties) Act 37 of 1971. His defence is one of alibi. The learned Judge did not accept his alibi and found that the defence threw no doubt at all, reasonable or otherwise on the

prosecution case and therefore found him guilty and convicted him of the offence. His appeal to us is purely based on facts and in view of the finding of the learned Judge, we are of the view that his appeal must be dismissed.

As regards the second appellant, he was identified by PW13, Chokaran bin Haji Masboor, who was then in the office receiving wages from the deceased. According to PW13 it was the second appellant who held a parang and a plastic bag and it was he who pointed the parang at the deceased. PW13 identified the second appellant at a police identification parade. In another parade held in respect of the first appellant's identification PW13 could not identify the first appellant because he said he was not sure. The inability to identify the first appellant was strongly attacked by Counsel and the Court was urged not to rely on his evidence. However the witness gave a good reason for not picking up the first appellant in the parade saying that he was not sure. For ourselves we see nothing wrong for the learned Judge to accept his evidence. The second appellant likewise gave a defence of alibi. His evidence was impeached by the prosecution, and as he called no other witness to establish the alibi, the learned Judge gave no weight at all to his evidence and therefore found the appellant guilty and convicted him.

In this appeal his Counsel raised three points of law which we think should be dealt with in this judgment.

The first point relates to the charge, which according to him is defective. The second appellant was charged as an accomplice under s. 3A of the Firearms (Increased Penalties) Act No. 37 of 1971. Under this section an accomplice who is liable for the offence is one who was not only present, but was also "reasonably presumed to have known that the principal offender was carrying or had in his possession or under his custody or control a firearm". The charge against the second appellant did not state that he "may reasonably be presumed to have known" that the first appellant had a pistol. Counsel therefore submitted that this omission rendered the charge defective. One of the rules relating to the framing of charges is that where the law does not give any specific name to the offence with which an accused person is charged, it will be sufficient for the prosecution to state in the charge so much of the definition of the offence as will give notice to the accused of the matter with which he is charged (s. 152(111) of the Criminal Procedure Code). It is not mandatory that a complete definition should be given in the charge. Looking at the charge we are not prepared to hold that the omission to make any reference to his knowledge that the first appellant had a pistol renders it defective. All that had to be stated in order to give notice to the second appellant so as to enable him to answer the charge was given. Moreover it was not shown that he was in any way prejudiced or misled by the omission. Knowledge is a matter of inference and unless it is clear that the law requires knowledge to be stated in the charge, its omission in our view does not render the charge defective. Of course it is preferable if such reference is made.

The second point raised by Counsel for the second appellant relates to the notice under s. 402A of the Criminal Procedure Code. This section requires an accused person, if he wishes to set up a defence of alibi at his trial, to give at least 10 days notice of the alibi to the Public Prosecutor before the commencement of the trial. In this case a notice was given to the Public Prosecutor but instead of being signed by the second appellant, it was signed by his solicitor. The prosecution objected to the admissibility of the defence of alibi because the notice was not signed by the second appellant himself. The learned Judge deferred making the ruling on this objection and in the meantime allowed the second appellant to give evidence of his alibi. Subsequently because the appellant's evidence differed from his cautioned statement, his credit was impeached by the prosecution; and it was only at the end of the

impeachment proceeding that the learned Judge made the ruling that the notice must be personally signed by the appellant. In our view the objection of the prosecution and the ruling by the learned Judge on this point were clearly untenable. The object of the notice is merely to enable the prosecution to check upon the veracity of the alibi. It is therefore sufficient if such notice was signed by someone on his behalf. Moreover in this case, there is no evidence to show that the second appellant had not authorised his solicitor to sign it. Therefore the prosecution's objection should have been overruled. However this erroneous ruling makes no difference at all to the result of this appeal because the rejection of the defence of alibi of the second appellant was not on account of this ruling, but on the basis of his credit having been impeached.

We now consider the impeachment of the second appellant's credit. Here we agree with the submission of Counsel for the second appellant as properly conceded by Shaikh Daud, Senior Federal Counsel appearing for the Public Prosecutor that under s. 113 of the Criminal Procedure Code even to use the appellant's cautioned statement for the purpose of impeaching his credit the statement must be proved to have been admissible, and therefore a trial within a trial must be held in order to determine this issue. Counsel submitted that the learned Judge did not hold this mini trial, whilst Shaikh Daud submitted that the trial was held.

Looking at the record of the trial we are satisfied that an inquiry for this purpose was held by the learned Judge, although he recorded it in the notes of evidence as "Proceeding to Impeach." In this proceeding which was treated by the learned Judge as a separate proceeding within the trial proper, the prosecution called two witnesses: A.S.P. Arumugam (PWI7) testifying that he recorded a cautioned statement from the second appellant on 7 February 1976, and Detective Corporal 30718 Ho Thong Chye (PW18) giving evidence that he acted as an interpreter in the recording of the appellant's cautioned statement. The cautioned statement was produced and marked as P22 (handwritten copy) and P23 (typewritten copy). Both the witnesses testified that the second appellant made the statement voluntarily without threat, promise or inducement. This aspect of the evidence as to the voluntariness of the cautioned statement was not challenged at all by the defence. This issue seemed to have been glossed over by the defence. The attack on the prosecution evidence was simply concentrated on the contention that the second appellant did not make the cautioned statement or any statement at all. According to A.S.P. Arumugam, the second appellant made two statements. The first statement which was not under caution was recorded by him on 5 October 1975 under s. 112 of the Criminal Procedure Code. This statement at the request of Counsel for the first appellant was produced as a defence exhibit and marked as D24. The second statement was made under caution and it was recorded by A.S.P. Arumugam on 7 February 1976 at Johore Bahru prison. He was assisted in the recording by PW18. The statement was admitted as Exhibit P22 (hand-written) and P23 (type-written). It was contended by Counsel for the second appellant that A.S.P. Arumugam did not record any statement on 5 October 1975 nor any cautioned statement at all on 7 February 1976 and that all he did was to read a statement previously prepared by him over to the second appellant, whilst Counsel for the first appellant submitted that all that A.S.P. Arumugam did was merely to read D24 over to the second appellant and that he did not record any new statement at all on 7 February 1976. In other words A.S.P. Arumugam was lying and P22, P23 and P24 were false documents manufactured by him. In this "Proceeding to Impeach" the second appellant was asked to reply to the evidence of PW17 and PW18. He took the oath merely to repeat what his Counsel had earlier on put in the cross-examination of these witnesses and denied by them in that the second appellant did not make any statement at all, cautioned or otherwise. The learned Judge dealt with this conflict of evidence at length in his grounds of judgment and came to the conclusion that the second appellant did make the cautioned statement

Exhibits P22 and P23 and the uncautioned statement Exhibit P24. He further held that the explanation by the second appellant being completely unsatisfactory his credit was therefore impeached and as a result his evidence became worthless to support his defence of alibi.

It is obvious that the issue which was canvassed before the learned Judge was not whether the Exhibits P22 and P23 were not made voluntarily, but whether they were made at all. In the records of the trial, the learned Judge made a note at the end of the "Proceeding to Impeach" in the following words:

> I find that these are discrepancies in the witness' evidence. In view of these discrepancies the witness credit is impeached.

The reference to "the witness" here is a reference to the second appellant. Thus because of the nature of the issue raised before him the learned Judge did not make a specific finding whether Exhibits P22 and P23 were made by the second appellant voluntarily.

This leads us to consider the effect of this omission, i.e. whether the omission to make this finding constituted a substantial miscarriage of justice entitling the second appellant to this appeal. We noted that although the learned Judge made no specific finding there is however ample evidence which leads to no other finding, if made, than that the Exhibits P22 and P23 were voluntarily made. A.S.P. Arumugam, whose evidence was accepted by the learned Judge said:

> ... I administered the caution. He understood the caution. I was satisfied that he understood the caution. The place where I took the statement is open to view to outsiders. I did not use violence. I did not threaten, promise or induce him. I was not I.O. of the case. I am satisfied that the accused was aware of the consequences of his statement.
>
> If the accused had refused to give a statement I would not have recorded the statement.

PW18 supported this evidence, saying:

> There was nothing to prevent the accused from leaving the room or refusing to give statement. He could refuse to give statement.

The accused referred to in the evidence quoted above is the second appellant. Thus, in view of this evidence which is in no way contradicted the learned Judge could have made a finding and the finding which could be made on the basis of this evidence would be no other than that the statements in Exhibits P22 and P23 were made voluntarily by the second appellant. This failure in our opinion did not occasion a miscarriage of justice entitling the second appellant to his appeal.

During the course of the arguments in this appeal we were referred to *Lim Ba Ba & Anor. v. PP* Federal Court Criminal Appeal No. 35 of 1980, no written judgment in which a somewhat similar point was raised but with some difference. In *Lim Ba Ba's* case the prosecution impeached the credit of the accused by using his cautioned statement, recorded under s. 37A(i)(b) of the Dangerous Drug Ordinance, which is in *pari materia* to s. 113 of the Criminal Procedure Code. The Judge is trying the case was the same Judge who was trying the case under the present appeal. In *Lim Ba Ba's* case which was tried much later than the present case the learned trial Judge did make a finding after holding a "Trial within a Trial" that the cautioned statement was voluntarily made and therefore admissible. The objection raised by Counsel for the accused in that case was that the learned trial Judge should not have been shown the inconsistent part of the statement before issue of admissibility was settled with a trial within a trial. The objection was overruled by the learned trial Judge and this Court agreed with his ruling and so the appeal was dismissed.

The procedure adopted by the learned trial Judge in that case as well as in this case was a time-honoured procedure which was laid down by Mr. Justice Taylor in *Muthusamy v. PP* [1948] MLJ 57. This procedure has been accepted and consistently followed by Courts in this country and we see no reason to depart from it.

One of the methods to impeach the credit of a witness is by proof of his former statement inconsistent with the evidence which is liable to be contradicted. This is enacted by s. 155(c) of the Evidence Act, according to which impeachment essentially consists of two elements:

(a) contradicting the witness' evidence; i.e. confronting him with the inconsistent statement; and

(b) proof of the statement.

As regards contradicting, the second limb of s. 145(1) of the Act requires the party who conducts the impeachment to draw the witness' attention to the inconsistent part of his statement, before confronting him with it. This rule is similar to the provision of s. 5 of the Criminal Procedure Act 1865 of the United Kingdom; its intention being to give the witness an opportunity of either explaining away the inconsistent part of the statement or correcting his evidence so as to remove the inconsistency. If as a result of his explanation or correction, there is no more inconsistency, the matter ends there, otherwise the witness is liable to be contradicted. Thus as a first step it is essential that the Court should be given the discretion to determine a preliminary question whether the witness' former statement is inconsistent with his evidence, otherwise much time will be wasted if it is found later that his former statement is not really irreconcilable with his evidence. We therefore think that it is a good procedure that a Judge should be shown the statement as a first step in the impeachment procedure.

Regarding proof of the former statement, this could be given by putting into the witness box the person, to whom the relevant statement was made or by whom it was recorded. The proof should show that the witness did make the relevant statement. In the case of an oral statement, evidence must be given what that statement was, but where the previous statement was written or reduced into writing, the writing itself should be produced. If the original writing is not available, with further proof as to its non-availability, a copy of the writing could be admitted. This is what happened in *Lim Ba Ba's* case, where a carbon copy was admitted and the Court held that this was perfectly in accordance with the law. In the case of a cautioned statement, the police officer recording it, in addition to giving evidence that he recorded the statement under caution has to go further and show that it was voluntarily made. Thus the procedure laid down in *Munusamy's* case as applied to a cautioned statement only adds one more rule in that it requires the prosecution to show that the statement was voluntarily made. It must be remembered here that, lest we may be misunderstood, the proof of the inconsistent statement, whether under caution or not, under this procedure, does not constitute evidence of fact, but only evidence of inconsistency because of the contradiction of the evidence of the witness with his former statement. In other words the former statement is not replacing his evidence which has been contradicted, but only renders his evidence completely untrustworthy.

As regards the time when proof of a cautioned statement should be undertaken for the purpose of impeaching the credit of a witness, we are of the view that this could be given either before or after contradicting the witness. The only disadvantage is that if this proof is given after the witness has been contradicted there is always a possibility that the cautioned statement after an inquiry may not be held admissible. In that event all the previous efforts

to impeach credit are lost and become a mere waste of time. It seems therefore preferable that in the case of impeaching the credit of a witness by the use of his cautioned statement, proof of the statement should be given before contradiction takes place.

Reverting to the present appeal we restate our conclusion as follows. The first appellant's appeal being based on the finding of facts and as we see no reason to disagree with the learned Judge in arriving at the finding, we therefore dismiss his appeal. Regarding the appeal of the second appellant, the appeal is equally based on the findings of facts. We see no merits in the attacks made on the finding by the learned Judge. The only point which was urged in his favour worthy of our consideration is a technical one in that the learned trial Judge did not make a specific finding that the cautioned statement of the second appellant used by the prosecution to impeach his credit was voluntarily made, though in the inquiry held for the purpose the prosecution had adduced enough evidence to enable the learned trial Judge to make such finding and such evidence was in no way contradicted. In our judgment such omission in the circumstances of the case does not constitute a miscarriage of justice and we therefore dismiss his appeal.

Also found at [1982] CLJ 186